

Vol. 2

# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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No. 312

THE UNITED STATES, PETITIONER

vs.

WILLOW RIVER POWER COMPANY

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ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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PETITION FOR CERTIORARI FILED AUGUST 1, 1944  
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No. 45067

In the United States Court of Claims

WILLOW RIVER POWER COMPANY, A WISCONSIN CORPORATION

v.

THE UNITED STATES

*Excerpts from transcript of evidence*

Plaintiff's witness, ALFRED R. SCHULTZ.

Direct Examination by Mr. RIESER:

53. Q. Now you spoke about the St. Croix dam being erected in 1866. Are the water wheels of the St. Croix dam, the generators, and the turbines located in the channel of the Willow river at or near the mouth, or are they erected some place else?

A. The present water wheels are erected, and the plant, between the Willow river and the St. Croix river or lake.

54. Q. Has that manner of operation existed for a good many years?

A. Yes.

55. Q. Prior to 1900?

A. Yes.

56. Q. For a number of years prior to that time too, according to your information?

\*A. Yes. I don't know the exact year, however.

57. Q. Now then, you say that the generators and the turbine of this St. Croix dam are ~~not~~ at the mouth. How was the operation constructed so as to permit that, if you can explain generally?

36 A. The operation at that particular plant was installed for milling purposes, and at the present site of the St. Croix plant there was a channel cut across the land in the narrow neck to permit discharging the water directly into St. Croix lake from the reservoir.

58. Q. By that you mean there was a channel dug and these generators placed into that new channel?

A. Yes.

59. Q. And that channel, was that built on land that was owned by your company, or the former Burkhardt Milling Company?

Mr. Cox. I object to that —

A. It was owned by the Burkhardt —

Mr. Cox. The question of ownership. That is not the best evidence as to ownership.

60. Q. I will just ask you this: was that constructed on land described as Section 23 and 24, in Township 29 north of Range 20

west, and Sections 13, 18, and 19 in Township 29 north of Range 20 west?

A. Yes.

61. Q. Now, what is there across the channel of the Willow river to hold the water back there?

A. There is a dike extending in an east-west direction along Bridge street. In the western portion of this dike there is a flume and gate, at which position at one time a grist mill was located and operated before the Power Company obtained possession of the land.

62. Q. But while the Burkhardt Milling Company had it?

A. The dike was built prior to that time.

37 63. Q. And was that built prior to 1900?

A. Yes.

64. Q. And has that been in substantially the same condition since your acquaintance with that operation?

A. Yes; there was one repair job prior to 1897, a part of that earthen embankment was washed out and it was repaired and brought to its original position.

65. Q. In about 1897, you say?

A. I think it was a little earlier than that, about 1894.

66. Q. Since then there has been no generation of energy or use of energy out of the channel or through the channel of the St. Croix River at that point, is that right?

A. Not since I joined the company.

67. Q. Now then, this dam here, or this place where the cut was made in the land to permit the installation of the generators, has there been some repair work done there from time to time, reconstruction?

A. Yes.

68. Q. When was it last done there?

A. The last repair work was done in 1934 and 1935.

69. Q. There had been a wash-out there and it was replaced?

A. The excessive flood of 1934 washed out the north part and weakened the portion south of the powerhouse. That went out in 1935.

38 170. Q. I show you now exhibit for identification "D-1" to "D-4," inclusive, and ask you whether those pictures reflect the condition of the river at about the time of the flood that carried out the generators and the fill to the north of those generators?

A. Yes.

Mr. Cox. Is that 1934 or 1935?

A. 1934, after the north portion of the dam washed out. I think that is quite early in the year, probably sometime in April.

171. Q. In April 1934?

A. 1934.

172. Q. And then Exhibit "D-1"—is the pipe and the concrete that is showing there—is that the edge of the spillway shown on about the center of Exhibit "D-2"?

A. Yes. It is the northernmost remnant of what was left of the gates of the old dam.

173. Q. And this area between the concrete and the mainland shown to the right, upper right hand of the picture, that was what was washed out?

A. Yes. That was the native soil that was between the Willow river and the St. Croix.

Mr. Cox. This was also in 1934?

A. Yes.

174. Q. That reflects about the condition at that time, is that right?

A. Yes.

39 181. Q. In exhibit "D-2" there are some sort of darker spots throughout the area toward the bottom of the picture that look like stumps. Is that what they are?

A. Yes; they are old tree stumps on the floor of the reservoir above the St. Croix dam.

182. Q. Then the area toward the bottom of Exhibit "D-2" is part of the old reservoir—or reservoir?

A. All the area from the plant as far as the picture shows is part of the floor of the old reservoir.

183. Q. And what was the size of some of those stumps?

A. Oh, two and one-half feet in diameter; eighteen inches to two and one-half feet in diameter.

184. Q. Is it true that the dam that you now use has a spillway, that you have described here earlier in the testimony, is to the left of this picture "D-2"; is that right?

A. Yes. Some distance to the left.

185. Q. That is the part that is used as a spillway that is built across the Willow river itself, is that right?

A. Yes; only we don't use it as a spillway. There is a gate there, but we haven't had it open for years.

186. Q. Now, I show you Plaintiff's Exhibit "E-1" to "E-4," inclusive, and ask you, first of all, when those were taken.

A. They were taken on April 5, 1942.

187. Q. Did you take those?

A. Yes.

40 188. Q. Do they reflect the conditions they purport to show as of about that date?

A. Yes.

189. Q. And are taken of the area involved in this proceeding, is that right?

A. Yes. The powerhouse shown on a number of the pictures is the St. Croix plant powerhouse.

190. Q. And the rest of them show the St. Croix river near its mouth?

A. The Willow river below the dike across Willow river. And the other one shows the direction of the river to the interstate bridge, although the channel of the Willow river is flooded out.

191. Q. Exhibit "E-2"?

A. It shows the results from the main railroad of the Chicago & Northwestern along the west bank of their embankment at the St. Croix plant.

192. Q. And shows the St. Croix plant, does it, in the distance, right in the immediate center of the picture?

A. Yes; powerhouse and gates.

193. Q. Exhibit "E-1"—what is that? From what direction of the dam is that shown?

A. That was taken from the north and looking southwest toward the Hudson passenger depot. You can see the depot in the extreme right hand of the picture, the water tower at the other, and then the east boundary of Lake St. Croix or the  
41 St. Croix river, around to the dike at the powerhouse.

194. Q. Is it true that the dam would be beyond the foot of the picture here—is that right—if continued?

A. The one across the Willow river; yes. The tainter gates are shown right adjacent to the power plant building, with the hoist in the left-hand side of the picture.

Mr. Cox. Is this an —

The COMMISSIONER. Do you want to object on the record?

Mr. Cox. I would like to identify this.

By Mr. Cox:

195. Q. The object there which projects into the St. Croix river, just about the center?

A. I would say that that is the north wall of the flume coming out of the powerhouse.

By Mr. Cox:

196. Q. And extending into the St. Croix river?

A. Yes.

197. Q. (Mr. RIESER continuing.) And that was taken at a time when the St. Croix river was at elevation 676.6; is that right?

A. That may be a little deceiving for that reason. The water is high on that projection, but that is the north wall of the flume permitting the water from the water turbines to get out into the lake.

198. Q. Exhibit "E-1"—is it true it looks downstream from—down the St. Croix from your dam; is that right?

A. Yes; the view is taken toward the southwest.

42 199. Q. And Exhibit "E-2" is looking up toward the dam, along the same area, is that right?

A. Yes; it is almost looking north.

200. Q. In connection with your operation of the St. Croix dam prior to the building of the Red Wing dam, were you in the habit of observing and did you know about how, under normal conditions, the water discharged into Lake St. Croix or the St. Croix river?

A. Yes.

201. Q. And, as a matter of fact, had you—when water was very low, what was the lowest elevation that you had observed in years prior to—say, during the ten years prior to 1938—on the St. Croix river?

A. The lowest surface water on Lake St. Croix was 666—I don't remember whether it was .5 or .6 or .7—somewhere along in there. A fraction above 666.

202. Q. And what is the occasion for you remembering that elevation? Did you have to do something in connection with your operation there to—

A. I don't recall at present any specific thing that we were doing. We had repairs at the St. Croix plant a number of times.

203. Q. Did you extend this flume any at that time, or about that time?

A. The particular work connected with the low stage was the water wheel draft tubes were out of the water so that we  
43 couldn't get good operation and we had to extend them down to a lower level.

204. Q. Now then, that, you would say, was the lowest stage of water during your operations there?

A. The lowest that I have any definite knowledge on; yes.

ALFRED R. SCHULTZ, witness on behalf of plaintiff.

Cross-examination by Mr. Cox:

309. Q. Do you know when the natural mouth of the St. Croix of the Willow river was damned or stopped?

A. From the records the dam was built in 1866.



311. Q. That was built at the natural mouth of the Willow river, was it not?

A. It was upstream from the mouth.

314. Q. No remains of that old dam now, are there?

A. I always understood it was the same structure across there, maintained from year to year, but I have no knowledge of what the dam in 1866 was like, other than what is there now.

315. Q. But your present hydro plant—your present St. Croix hydro plant—is situated on a strip of land between what is known as Lake Mallalieu and the St. Croix river, it is not?

A. Yes.

316. Q. And that strip of land is approximately one hundred feet to one hundred and fifty feet in width?

A. It varies from point to point. I would say up to two hundred and fifty feet, somewhere in that neighborhood.

317. Q. At the narrow point where you have cut through that strip of bank it is approximately not exceeding one hundred feet, is it?

A. Yes. I would say one hundred and twenty-five to one hundred and fifty. It is well above a hundred feet.

\* \* \* \* \*

332. Q. Now, as I understand your testimony, your St. Croix plant, or rather the north bank, or the bank extending northward from your St. Croix plant, washed out in 1934?

A. Yes.

333. Q. And also in the 1934 flood your tainter gates washed out, is that correct?

A. Yes. One remained in place. It was damaged so that it had to be removed.

334. Q. But in 1935 your powerhouse and a considerable portion of this strip of land to the south of the powerhouse washed out?

A. Yes.

\* \* \* \* \*

352. Q. The Willow river had washed out a new mouth there at the point of your plant, hadn't it—had effected a new mouth to the St. Croix river?

A. Well, it washed out an opening across that land for a distance north and south of the old powerhouse.

\* \* \* \* \*

379. Q. Mr. Schultz, your St. Croix powerhouse and a wing wall extends out therefrom to the westward, extend towards the St. Croix river, do they not?

A. Yes; the wing wall is only on the north part of the gate section.

45 380. Q. Do you know to what approximate elevations the foundations of those structures extended down into the bottom of the St. Croix river after they were reconstructed in 1935?

A. Not from memory.

GEORGE E. ACKERMAN, witness on behalf of plaintiff.

Direct examination by Mr. RIESER:

72. Q. You tell us where the lower part of the head of a dam begins in determining the head of the dam?

A. The head is measured from the elevation of the head water at the entrance to the turbines. The tail water is measured as the elevation of water at the discharge end of the draft tubes.

73. Q. What was the head of this dam after you rebuilt it in 1934 and 1935?

A. That varied with the elevation of the—the operating head varied as the elevation of the tail water varied.

74. Q. Assuming there was no interference from tail water, what would have been the head then?

A. At certain periods of the year, when the St. Croix river was low, the head would be in the neighborhood of twenty-two and one-half feet.

75. Q. So it ranged from twenty-two and one-half feet to zero, depending upon how high the St. Croix river was?

46 A. I have never seen it at zero. I have seen it as low as eight feet difference between head water and tail water.

Mr. Cox. You say you have seen the head water down to eight feet?

A. Approximately eight feet; yes.

76. Q. That was during floods on the St. Croix river?

A. Yes.

\* \* \* \* \*

134. Q. Now then, in arriving at your estimate or conclusions as to what, if any, damage resulted and what, if any, effect upon the system resulted from the raising of the water in the St. Croix river, on what principle do you proceed, Mr. Ackerman, as to how damage is determined?

A. The first step is to examine the records showing the elevations of the tail water.

135. Q. Those are records that have been introduced here?

A. Yes, sir.

136. Q. Then in what order do the steps come?

A. From those records we are able to determine the head, the operating head, on the power plant at any given time, and we are able to determine the average head over periods of time. We also

have records or data showing the elevation of the tail water since the Red Wing dam was constructed. By comparison of the records and the heads obtaining before the Red Wing dam was constructed with the heads obtaining after the Red Wing dam was constructed, we are able to determine the loss in power, reduction in operating head, and with that data, knowing the previous output of the power plant over a considerable period of years, we are able to compute the production that would have taken place or that the power plant would have been able to make in the same period if the head had been reduced. We are able thus to determine the approximate number of KW hours of energy lost by the power plant due to the reduction in head.

136. Q. All right; and is that the method by which you have proceeded in arriving at your conclusions in this matter?

A. Yes.

137. Q. Now then, what is the equipment installed at the St. Croix plant in the way of generators, and what kind are they?

A. Generators?

138. Q. Yes; the generating units as a whole?

A. The power plant is equipped with two vertical direct connected hydroelectric units, and these units consist of vertical type open flume water wheels, each having a full gate rating of approximately two hundred and sixty horsepower. On the generator end each unit consists of a generator rated at one hundred and fifty KW in capacity. There are no gears interposed between the turbine and the generator. The shaft of the turbine is connected directly to the vertical shaft of the generator.

ALFRED R. SCHULTZ, witness on behalf of plaintiff.

Cross-examination by Mr. Cox:

496. Q. Did the government take and occupy, or does it now use or did it ever heretofore use, any part of your powerhouse, machinery, or equipment?

Mr. RIESER. If you confine that to "use," I will not have any objection. But if you say "take, occupy, and use" I must object as a legal conclusion, or it includes a legal conclusion.

Mr. Cox. Very well.

497. Q. Does it occupy, or did it ever occupy, your powerhouse or any of the equipment therein?

A. It destroyed the use—

498. Q. I am not talking about destroying. I want to know whether the government ever physically occupied—

A. Not the powerhouse; no.

Mr. RIESER. The question included also some of your other equipment in the powerhouse.

499. Q. Or did it ever occupy or use any of your equipment or machinery in the powerhouse?

A. The only portion would be the draft tubes, to my mind, that they probably did occupy. As far as the instruments in the powerhouse goes, no.

500. Q. You mean the draft tubes there may have been  
49 submerged by water?

A. Yes; and it occupied it so we couldn't make use of it.

501. Q. But it never used it, did it—the government never used your draft tube?

A. Not to run water through; no.

\* \* \* \* \*

504. Q. Whether you have been physically ousted of any of your property there, of your land or of your powerhouse or the machinery therein?

A. I would say we were ousted from the land and the use of our machinery as I understand the word "oust" for the property that we have been making use of.

505. Q. I am using the word "oust" in the sense of being dispossessed?

A. Yes; I would say "yes."

506. Q. Very well; now what part of your land, powerhouse, or machinery have you been dispossessed or ousted?

A. I would say we have been dispossessed of the lower portion of our draft tube and the two generators we are using and of the land below the dam across Willow river.

507. Q. In what way? In what manner?

A. That we can't use it. It is flooded so that we can't get down on that land.

508. Q. Have you been dispossessed or ousted of any land below elevation 676?

A. Yes.

509. Q. What part?

50 A. This same part that I referred to before. That is the only land that we have—

\* \* \* \* \*

511. Q. Now, as a matter of fact, you are still operating your St. Croix plant and generating power and distributing it right at this very moment, are you not?

A. Partly.

GEORGE E. ACKERMAN, witness on behalf of plaintiff.

Direct examination by Mr. RIESER:

280. Q. Now, Mr. Ackerman, in the procedure that you have followed here, is that one that is commonly used in your profession and particularly in your practice in the past in arriving at estimates of the relative value of a water power development, say, to a development of comparable capacity by steam or diesel?

A. Based upon my experience, it is the fairest and the most reasonable method that I know of that can be used.

281. Q. And the plan that you followed out here is a plan that you have used before and would use in advising a client with respect to either the construction of a plant or the purchase of one?

A. It is the plan that I have used in the past in numerous problems. It is the plan that I would use in the future.

282. Q. Or would you use in the event that you were to advise with reference to the purchase or sale of the Willow River Power Company in determining whether or not this water had affected, and the elevation of the water in this dam had affected, the value of this property?

GEORGE E. ACKERMAN, witness on behalf of plaintiff.

Direct examination by the COMMISSIONER:

387. Q. As a practical matter in the design, I wanted to know the maximum head, the way the equipment is installed, and the way the dam is built; what is the maximum head?

A. I would say twenty-two and one-half feet.

388. Q. Twenty-two and one-half feet?

A. Very close to twenty-two and one-half feet.

GEORGE E. ACKERMAN, witness on behalf of plaintiff.

Cross-examination by Mr. Cox:

292. Q. Does that indicate to your mind any loss of the power to produce at the St. Croix plant by reason of the increased height of Pool No. 3 above the dam at Red Wing?

A. It does indicate a distinct loss due to the interference.

393. Q. May I ask, just to clarify? You stated there, as a maximum head, twenty-two and one-half feet. Is that measured from a full pond in Lake Mallalieu to the lowest water in Lake St. Croix, elevation 666.66 —

A. I gave that as an approximate figure.

393. Q. (Continued.) Or did you measure it from a full pondage in the lake to the average elevation in Lake St. Croix?

A. If we have a headwater elevation of 689—that is, if the water is at the crest of the gates—then an operating head, a gross operating head, of twenty-two feet would mean that the water  
52 in Lake St. Croix, at the tail race discharge must be at elevation 666.5.

394. Q. And it varied as the St. Croix river rose; even before the construction of Dam No. 3 that had varied, did it not?

A. As the elevation of Lake St. Croix rose above elevation 666.5, the head would decrease from twenty-two and one-half feet.

RODGER HOOPER, witness on behalf of defendant.

Direct examination by Mr. Cox:

40. Q. (Mr. Cox Continuing.) Mr. Hooper, did you prepare a drawing of the Willow River Power House?

A. It was prepared under my direction.

41. Q. Will you look at that drawing and state what it is?

A. It is a drawing showing the plan and in elevation some of the details of the powerhouse and tainter gate section of the so-called St. Croix dam of the Willow River Power Company at Hudson.

Mr. Cox. Defendant offers in evidence Defendant's Exhibit "8," entitled "Willow River Power Company, U. S. Court of Claims No. 45067, plan and elevations of powerhouse, U. S. Engineer Office, St. Paul, June 1942."

Mr. RIESER. I have no objection, subject to verification, Doctor. I should like to verify —

The COMMISSIONER. Verification in what manner?

Mr. RIESER. Subject to verification as to several of the  
53 specifications given on the map. Otherwise, I have no objection.

The COMMISSIONER. All right. Let the exhibit be received as offered, subject to verification.

42. Q. Where did you obtain the data for this map or drawing?

A. By actual physical survey at the site.

43. Q. Did you make the survey?

A. It was made under my direction.

85. Q. Did you have occasion on that day to visit the powerhouse of the plaintiff company?

A. The outside of it. I wasn't inside of it.

86. Q. Did you notice the conditions of the water with respect to the west face of the powerhouse?

J A. Yes.

87. Q. What was the condition of the water?

A. Well, the water was flooding out the west edge of the company's property. The water of the St. Croix was on that portion of the dam that extends out.

88. Q. What are those long walls extending out below the tainter gates towards the river?

A. By "below" I take it you mean downstream from the tainter gates?

89. Yes; below the tainter gates?

A. I don't know whether they have an official name. They are apparently some sort of guide wall.

90. Q. Built of what material?

54 A. Concrete. It confines the tailrace from the powerhouse.

91. Q. And approximately how far out beyond the bank do those extend?

A. Well, I would guess—the defendant's exhibit shows that.

92. Q. Would you look at that exhibit and state approximately, as near as you can?

A. Defendant's Exhibit No. 8—I have to add some of these figures together—indicates it is thirty-two feet from the west face of the powerhouse out to the edge of the westernmost crosswalk, their walkway, and about two and one-half feet farther to the end of the most westerly extent of the wall. That would be about thirty-four feet.

93. Q. Will you mark the edge of that concrete wall by an "X" mark in red pencil?

A. Yes, sir; I have done so.

94. To what extent, if you know, does that wall extend down into the bottom of the river; that is, the bottom of the foundation?

A. We measured the elevation of the bottom of that tailrace; that is as near as I can tell you. The foundations, of course, extend down below that.

95. What was the bottom elevation of the tailrace?

A. The bottom elevation of that was 663.2.

55 96. Q. 663.2; and it would extend below that?

A. It would have to or it would be unstable.

97. Q. And rests upon the bottom of the river?

A. Rests into the bottom of the river—extends into the bottom of the river.

98. Q. Were you able to ascertain the depth to which the foundation of the powerhouse extended into the bottom of the river on its west face?

A. No, sir.



M. P. EKBERG, witness on behalf of defendant.

Redirect examination by Mr. Cox:

572. Q. I show you two photographs marked "photographs Nos. 591 and 592," and ask you if you can identify the objects in those photographs and state what they are?

A. Yes; I can identify the objects in these photographs. They are both photographs of the St. Croix plant of the Willow River Power Company.

573. Q. As of what date?

A. March 6, 1940.

574. Q. Can you state the elevation of Lake St. Croix at that time?

A. To my own knowledge?

575. Q. You can refer to the gage records if you like, to refresh your memory.

A. 672.1 at Hudson.

Mr. RIESER. May I inquire, Doctor, what the purpose of this is?

56 Mr. Cox. Just as a matter of general information, for the information of the court, to get a better view of plaintiff's property.

Mr. RIESER. Is there any purpose by this picture to establish any elevation, or any elevation with reference to any other —

Mr. Cox. None whatever.

576. Q. Do you know whether or not those pictures were taken for the official files of the Engineer Department?

A. They are from the official files of the Engineer Department.

Mr. Cox. Defendant offers the photographs in evidence, to be marked "Defendant's Exhibit 22."

The COMMISSIONER. Without objection, let the photographs be received as offered.

Mr. RIESER. What elevation did you say the pool was on the date these pictures were taken?

A. 672.1 at Hudson.

577. Q. What is that line on these concrete walls extending out—concrete walls which extend out into the river?

A. That is a line made by the water standing at its normal pool elevation.

The COMMISSIONER. Are you now referring to Defendant's exhibit 22?

Mr. Cox. Defendant's Exhibit 22.

578. Q. Do you know the reason why the water was drawn down to that elevation at that time?

A. I didn't know about that for sure, and Mr. Wilson testified on that this morning, I believe, and I recall that probably is the



reason it was drawn down. I had nothing to do with that part of the work.

579. Q. I show you another sheet of photographs marked "Photographs Number 593 and 594," and will ask you if you can identify the objects in those photographs?

A. Yes; I can identify the objects in those photographs. The top one is a photograph of a portion of the St. Croix plant of the Willow River Power Company. The bottom photograph on the sheet is more of a general view and shows the entire plant.

Mr. Cox. Defendant offers the photographs in evidence, to be marked as "Defendant's Exhibit 23."

The COMMISSIONER. Let it be received as offered.

580. Q. I show you two other photographs, Numbers 595 and 596, and will ask you if you can identify the objects in those photographs?

A. Yes; I can. They are both photographs of the St. Croix plant of the Willow River Power Company.

581. Q. Are they also official photographs of the Engineering Department?

58 A. Yes, sir. These were taken from the official files of the Engineering Department.

582. Q. And as of what date were they taken?

A. March 6, 1940.

Mr. Cox. Defendant offers the photographs in evidence to be marked as "Defendant's Exhibit 24."

M. P. EKBERG, witness on behalf of defendant.

Re-cross-examination by Mr. RIESER:

586. Q. And the notation on Exhibit 23 with respect to the effect of the normal pool stage being indicated. What do you understand by that reference?

A. There is a well-defined mark on the riprap of the bank and also, of course, the structure.

587. Q. You mean the light area?

A. The light area is below the mark. The mark is rather dark. The COMMISSIONER. What does the mark mean?

A. That mark was made by the water of the pool standing at its normal pool elevation.

588. Q. That is, the light part is between the mark and the surface of the water?

A. Yes; it is somewhat light there.

589. Q. And then there is an indication also along the edge of the water of the effect of wave action on the riprap to some extent, sort of a line there?

A. No; I can't say that is the effect of wave action. I don't doubt there has been some wave action, but I can't say from the mark.

59 590. Q. Isn't there a distinct indication of a wearing out there right on the upper line of that riprap?

A. No; I can't say so from the photograph. There may be some disturbance of the riprap from the water, but the photograph does not indicate it clearly.

591. Q. Then you and I just don't see right the same way, but that is for anyone to examine. In other words, you would expect to find some wearing out after a year or two of wave action on that riprap, wouldn't you?

A. Well, I would on bare soil. I wouldn't expect to find much of a nick cut in that riprap. Sometimes there are small particles of material in the riprap that might wash out.

592. Q. And the ice action would, of course, have the same effect?

A. The ice would have a different effect, if it had any.

593. Q. It would tend to wear out that riprap faster than it would ordinarily wear out if it was just exposed to the air?

A. If there was expansion of ice in the wintertime it might tend to force the riprap up.

594. Q. And would follow generally the level of the water along the bank there, is that right?

A. There is a very fine line there that shows the pool elevation.

60 In the Supreme Court of the United States

Office of the Clerk, Supreme Court U. S. Received Nov. 22, 1944.

*Stipulation to print an abbreviated record*

Filed Nov. 22, 1944

Petitioner in the above-entitled proceeding intends to rely only upon the following points set forth in its assignment of errors:

The Court of Claims erred:

1. In holding that there was a taking of respondent's property within the meaning of the Fifth Amendment, although there was neither a claim nor a finding of any invasion of respondent's fast lands.

2. In failing to hold that the raising by the Government of the water level of the St. Croix River above 672 feet mean sea level, which merely reduced the power which can be produced by re-

spondent's hydroelectric facilities using water emptying into such stream, did not constitute a taking of respondent's property within the meaning of the Fifth Amendment.

3. In failing to hold that the damage, if any, suffered by respondent as a result of raising the water level in the St. Croix River was consequential in nature, for which just compensation is not recoverable.

4. In holding in substance that respondent had a vested interest in the maintenance at its natural level of the water in a navigable stream

61 5. In failing to find that respondent's tailrace was an integral and essential part of its electric power plant and that it was located in the bed of the St. Croix River.

6. In failing to hold that such disposition of respondent's tailrace in the bed of a navigable stream subjected it to the consequences of any rise above the ordinary high water level of that stream resulting from any improvements of navigability.

\* \* \* \* \*

11. In entering judgment for respondent.

It is hereby stipulated by and between the parties hereto, by their respective counsel, that, in addition to those portions of the record printed for the purposes of the petition for certiorari and now designated as Volume I of the record, only those portions of the transcript of proceedings attached hereto need be printed, such additional material to comprise Volume II of the record. Nine copies of the following exhibits will be furnished the Court: Exhibits A, D-2, E-1, E-2, 7, 8, 22, 23, 24, after such copies have been approved by counsel for the parties as clear and faithful reproductions of the original exhibits.

It is further stipulated that those portions of the record to be omitted from the printed record may be referred to by either party, if deemed necessary, in the briefs or during the course of argument.

CHARLES FAHY,  
*Solicitor General,*  
*Attorney for Petitioner.*

JOHN WATTAWA,  
*Attorney for Respondent.*

NOVEMBER 21, 1944.

[File endorsement omitted.]